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ABSTRACT

These guidelines are intended to inform school administrators about the scope and limitations of the Equal Access Act (Title VIII of Public Law 98-377), which provides equal access to school facilities for students who wish to meet for religious, political, philosophical, or other discourse. First, an overview of the act describes its various provisions. Second, the history of the act is reviewed to help understand both the reasons and the broad support for the act. A discussion of the various constitutional rights protected by the act follows, including a review of the Supreme Court decisions regarding religious activities in the public schools. The guidelines conclude with a series of questions and answers on issues pertinent to school administrators: (1) Who and what is covered by the act? (2) When is the act triggered? (3) How may a school implement the act? (4) What is a school not authorized to do? (5) How is the act enforced? (6) What authority does the school retain? and (7) additional questions. Two appendixes provide (1) statements concerning Equal Access guidelines by its two Congressional sponsors, Don Bonker (D-Washington) and William F. Goodling (R-Pennsylvania), and (2) the Equal Access Act guidelines. A bibliography is included. (TE)

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THE EQUAL ACCESS ACT

Implications for Secondary School Policies

Public Law No. 98-377

Effective: August 11, 1984

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The Christian Legal Society is a national professional association of attorneys, judges and law students. One aspect of its activities relates to the preservation and enhancement of First Amendment liberties. The Society closely monitors developments in areas of Establishment and Free Exercise issues, and is the publisher of the **Religious Freedom Reporter,** a monthly professional review of federal and state cases, decisions, law review articles and legislation in areas of church-state and related issues. The Society, through major national symposia, provides a forum for the review of complex issues in this arena, including a major emphasis on issues in public education.

The Society served as a major legal resource for senators and representatives in the drafting stages and at hearings on the Equal Access Act. Society staff members testified at several of the hearings, and have written extensively on the scope of the Act and its protections. This analysis is a product of that substantial involvement in the research and analysis which led to the adoption of the Equal Access Act.

The Society has also sought to work with other organizations interested in the Act. A summary statement of the nature of the Act's provisions was developed jointly by several of these organizations, some of whom supported and others of whom had reservations regarding the Act. That statement is included as an appendix to this analysis. The joint statement notes several organizations from which further information may be obtained concerning the Act, including the Christian Legal Society.

While the entire legal staff of the Society has been involved in the advocacy of an equal access approach, and has contributed to this analysis, the primary research and drafting has been the work of the Society's Research Director, Kimberlee Colby.

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THE EQUAL ACCESS ACT: IMPLICATIONS FOR SECONDARY SCHOOL POLICIES

Public Law No. 98-377

Effective: August 11, 1984

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THE EQUAL ACCESS ACT

(Title VIII of Public Law 98-377)

Short Title

Sec. 801. This title may be cited as "The Equal Access Act."

Denial of Equal Access Prohibited

Sec. 802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that —

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof —

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Definitions

Sec. 803. As used in this title -

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Severability

Sec. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

Construction

Sec. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

THE EQUAL ACCESS ACT: Implications for Secondary School Policies

I. INTRODUCTION TO THE EQUAL ACCESS ACT

The Equal Access Act became law on August 11, 1984. The Act requires that public secondary schools grant equal access to student groups who wish to meet for religious, political, or philosophical purposes, if the school allows other types of non-curriculum related student groups to meet. The Act is designed to remedy any discrimination against these types of student speech, particularly religious speech. The Act was initiated in response to an increasingly widespread uncertainty among school administrators whether students could be permitted to meet for religious speech.

The Act is limited in scope:

1. The Act does not create a new right for students, their parents, nonschool persons, teachers, or any other person. The Act merely affirms the right of students to initiate and meet for religious, political, and philosophical speech.

2. The Act is not intended to limit school administrators' discretion in maintaining discipline in their schools. It gives school administrators complete authority to pursue their primary goal of education of the students.

3. The Act does not prohibit any activity that is otherwise constitutional nor define the outer boundaries of what is constitutional. The Act does provide a "safe harbor" where schools can be assured that they are in compliance with the Act.

These guidelines are meant to inform school administrators both as to what the Act does and does not do. First, an overview of the Act describes its various provisions. Second, the history of the Act is reviewed to help understand both the reasons and broad support for the Act. A discussion of the various constitutional rights protected by the Act follows, including a review of the Supreme Court decisions regarding religious activities in the public schools. Finally, the guidelines conclude with a series of practical questions and answers that school administrators may have.[1]

[1] When these guidelines were written, the Department of Education had not issued regulations concerning various provisions of the Act. It may yet do so. Furthermore, no federal court had addressed the Act to interpret its provisions. School administrators should seek local guidance as to whether the Department of Education has issued regulations or whether federal courts have interpreted the bill at the time that they have a question about the bill.

II. THE ACT: EQUAL ACCESS IS THE LAW

The title of the Equal Access Act captures the theme of the entire bill and provides the guiding principle for applying its provisions. Its purpose is to provide equal access to school facilities for students who wish to meet for religious, political, philosophical, or other speech.

There are three key principles for a school administrator to understand when applying the Act:

1. The Act requires *equal* access, not preferential treatment, for religious, political, philosophical, or other speech.
2. The Act protects religious speech that is *student*-initiated and *student*-led, not religious speech that is *state*-initiated, *school*-sponsored, or *teacher*-led. The Supreme Court has prohibited state-initiated and state-sponsored religious activities, but it has never prohibited student-initiated and student-led religious activities that are merely given equal access with other student activities. To do otherwise would violate the students' First Amendment rights of freedom of speech, freedom of association, and free exercise of religion.
3. The Act in no way diminishes the authority of the school administrators to maintain *order and discipline* in the schools or to *protect the well-being* of students and faculty.

The Act has seven key provisions:

1. Section 802(a) spells out the basic principle of equal access: Students cannot be denied access to school facilities on the basis of the content of their speech.
2. Section 802(b) states what the school must do to trigger the equal access requirement.
3. Section 802(c) describes a "safe harbor" in which a school may be virtually ensured of compliance with the Act.
4. Section 802(d) spells out certain things the Act does not authorize.
5. Section 802(e) clarifies how the Act will be enforced.
6. Section 802(f) emphasizes that school administrators retain control to protect both school property and students.
7. Section 803 defines key terms of the Act.

In order to understand the Act, it is useful to go through each provision phrase-by-phrase.

A. SECTION 802(a): THE HEART OF THE LEGISLATION: EQUAL TREATMENT

"It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."

In a nutshell, section 802(a) makes it illegal for a secondary school to deny equal access to school facilities to students wishing to meet based on the content of the students' speech.

The Act applies to any public secondary school receiving federal financial assistance. State law determines whether a school is a secondary school. The Act applies to a secondary school only if the school has a "limited open forum," as defined in Section 802(b).

If a secondary school has a limited open forum, it may not deny equal access to students wishing to meet. "Equal access" is a constitutional requirement recognized by the Supreme Court in *Widmar* v. *Vincent*. In *Widmar*, the Supreme Court held that university students have a free speech right to meet for religious speech on university property. Equal access means that the groups protected by this Act must be given equal treatment with other groups that the school allows to meet. It does not require special treatment, merely equal treatment.

Section 802(a) speaks only of students wishing to conduct a meeting. The Act itself does not protect the rights of anyone who is not a student to engage in any of the types of meetings discussed; nor does it create a right for students from another school to come in and have meetings.

The phrase "conduct a meeting" includes activities of students that are permitted for all groups by a particular school. Therefore, the term "meeting" is not limited to just a formal meeting but might also include dances, athletic events, distribution of literature, or other activities that student groups are allowed to take part in as an extracurricular activity.[2]

Finally, the Act makes clear that it protects religious, political, philosophical, or other content of speech. Prayer, study of religious books, including the Bible, religious discussions, and other religious expression are all included in the term "religious speech." The Supreme Court has held that prayer is a form of speech protected by the First Amendment.[3]

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[2] This is found in 803 (3).

[3] *Widmar* v. *Vincent*, 454 U.S. 263, 269 (1981).

B. SECTION 802 (b): THE TRIGGER FOR THE EQUAL ACCESS REQUIREMENT: A LIMITED OPEN FORUM

"A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."

Equal access is a constitutional requirement based on a fundamental First Amendment principle: The state, including schools, cannot discriminate against speech solely on the basis of its subject matter. In other words, the state cannot create a list of "acceptable" speech which it permits on its property and another list of "unacceptable" speech which it does not permit.

Equal access protects students from censorship. Thus, equal access is a *constitutional* requirement that should be applied at all times to students' extracurricular speech in public schools. However, this specific legislation is violated only when the school has a limited open forum and then denies equal access to a particular student group.

The legal term "limited open forum" is relatively new. Lawyers and even judges, one suspects, have some trouble applying the concept. However, school administrators should not be disturbed, because the Act itself defines the term "limited open forum."

Generally, if a secondary school allows students to have extracurricular activities, a limited open forum probably exists. Section 802(b) defines a limited open forum as existing "whenever a school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." By looking at some of the terms individually, its meaning becomes clearer:

1. *"an offering to or opportunity for":* The Act does not require that other student groups actually be meeting in order for a student group to have equal access to school facilities. The Act only requires that the school have made an offering to or opportunity for one or more groups to be meeting. In other words, if a school normally has a policy or practice of allowing student groups to meet, then equal access applies, even if no student group is actually taking advantage of the opportunity at the time.

2. *"one or more":* The opportunity need be available only to one noncurriculum related student group in order to trigger equal access.

3. *"noncurriculum related":* A noncurriculum related meeting is an activity not *directly* related to the school curriculum.[4] The emphasis is on the word "directly."

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[4] This is found in Section 803 (3).

To determine whether any student activity permitted by the school is noncurriculum related and, therefore, triggers the Act, a school administrator should ask two questions.[5] If the answer to either question is no, then the activity is noncurriculum related and triggers the Act. The questions are:

(a) Does the activity have subject matter which a public school usually sponsors; *and*
(b) Does the school require or directly encourage student participation in the activity in connection with curriculum course work?

To *avoid* triggering the Act, *all* student activities allowed by a school must meet *both* tests.[6]

4. *"on school premises during noninstructional time"*: Noninstructional time is time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.[7] It is time when the school has decided to allow students to meet for noncurriculum related activities.

This includes time before the students attend their first class or after the students attend their last class. Although the legislative history is somewhat unclear, we believe it also includes time before an individual student's school day begins or after it ends even though other students may be receiving classroom instruction at the time. For example, where students have varied schedules, as is common in many high schools, the Act should be triggered by the individual student's schedule rather than the school's schedule.[8]

It also may include time during the school day when the school does not offer actual classroom instruction but allows students to attend extracurricular activities or during the lunch hour. Any time during which noncurriculum related student groups are permitted to meet would, it seems, be "set aside" by the school, and thus constitute noninstructional time.

NOTE: In interpreting the Act, school administrators should remember that Congress was setting forth one set of particular circumstances in which equal access is required. Because equal access is a constitutional requirement and not merely a privilege granted by Congress, it may be required in circumstances not detailed in the Act. To avoid violating its students' free speech rights, a school should apply the equal access requirement in all circumstances of student-initiated extracurricular activity.

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[5] This test emerged in congressional testimony and was suggested by Rep. Goodling, a former school administrator. 130 *Cong. Rec.* H7732 (daily ed. July 25, 1984).

[6] This test is explained in more detail on pages 26-27 of this analysis.

[7] This is found in Section 803 (4).

[8] 130 *Cong. Rec.* S8355-56 (daily ed. June 27, 1984) (statement of Sen. Denton).

C. SECTION 802(c): A SAFE HARBOR WHICH SUCCESSFULLY FULFILLS THE ACT'S EQUAL ACCESS REQUIREMENT

"Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that —

(1) the meeting is voluntary and student-initiated;
(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
(3) employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;
(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups."

If a school conforms with Section 802 (c), it will be deemed to have met the fair opportunity section of the Act.

In Section 802 (c), Congress describes a "safe harbor" for school administrators. If a school district chooses to follow these provisions and is challenged for allegedly violating the Act, it will be presumed that there has been no violation.

However, policies and practices differing from those described in Section 802 (c) are not prohibited by the Act. Such policies and practices should be carefully examined to ascertain that they are in conformity with the Constitution. The *only* requirement of the Act is that the school must grant equal access if they have a limited open forum.

Some view Section 802 (c) as a list of mandatory requirements for complying with the Act.[9] Although there is some legislative history to support this view, the "safe harbor" reading is fully consistent with the statutory framework, the actual language of the Act, and the legislative history. The intent of the Congress was to protect students' First Amendment rights while leaving maximum discretion to local school administrators.

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[9] Under such a reading, a school must uniformly apply all the conditions of 802 (c) in order to comply with the Act and enjoy its protections. For example, no teacher could participate in *any* non-curriculum related student group, even those without religious or political content. Although this view provides clear guidelines and uniformity of policy, it seems to substantially and unnecessarily interfere with the school's proper discretion.

However, even on this restrictive reading of 802 (c), the Act would not prohibit other policies or diminish the constitutional rights of students. So long as the school permitted equal access, schools in the proper exercise of their discretion could apply different constitutionally permitted conditions. The Act, however, would no longer provide a basis for defending those policies.

1. *The meeting is voluntary and student-initiated.* This provision is a criterion of a safe harbor, because it recognizes the critical distinction between state-initiated and student-initiated activity. For religious meetings, this distinction is particularly relevant because the Establishment Clause may prohibit state-initiated religious activity. This provision also would ensure that student meetings originate only out of student interests and not from the interests of outside religious, political, philosophical, or other groups. Under this provision, the request to meet must come from a student or students rather than from a teacher, a parent, or a nonschool person.

2. *The school or its employees may not sponsor the meeting.* If a school district adopts this provision, it has decided that neither it nor its employees will sponsor any of the noncurriculum related student meetings that occur. In Section 803 (2), sponsorship is defined to include promoting, leading, or participating in a meeting. However, an employee may be present for custodial purposes to ensure the safety of the students and school property.

Sponsorship is a legal term. It is not always what school administrators normally mean by "sponsorship." A main component of sponsorship is the degree of encouragement a school offers students to attend the meeting. Under this provision, the school would not offer any special privilege to students who are attending any meeting. Sponsorship also looks at the degree of financial involvement of the schools; however, incidental financial expenses are allowed, such as heat and lights.

This provision is a criterion of a safe harbor, because the school district, for either policy or constitutional reasons, may wish not to sponsor various extracurricular student meetings. For example, sponsorship of a religious student meeting, either by special encouragement or financial assistance, may well be barred under the Establishment Clause. Also, a school for policy reasons may not wish to sponsor political or philosophical groups.

3. *Employees may be present at a religious meeting only in a nonparticipatory capacity.* This safe harbor provision, as explained above, also avoids a potential Establishment Clause problem. Some believe that participation by an employee of the state in a religious student meeting would be sufficient state involvement in the meeting to violate the Establishment Clause. Although this provision could be attacked as a violation of the employee's Equal Protection and Free Speech rights, such an attack is not likely to be upheld at this time. If a school adopts this standard, employees may still be present at religious meetings to ensure students' safety and protect school property.

4. *The meeting may not interfere with the necessary school discipline.* Students have a free speech right to express themselves to other students at school during appropriate times. This right, however, does not override the school's discretion to pro-

hibit any activity that materially and substantially interferes with the orderly conduct of educational activities within the school.[10]

5. *The meeting may not be directed, conducted, controlled, or regularly attended by nonschool persons.* Nonschool persons include everyone who is not a student or school employee. A school may prohibit nonschool persons from attending student meetings completely. Under this safe harbor provision, the school has the option of allowing nonschool persons to attend some student activities, as long as they do not direct, conduct, control or regularly attend meetings. If this provision were adopted by a school, the school would still only be concerned with contacts between students and nonschool persons on school premises. The provision would not require, and the Constitution does not permit, school administrators to prohibit students from having contact with nonschool persons off school premises outside of school hours.

6. *Policies and practices beyond the safe harbor provisions.* As already noted, policies and practices differing from those described in Section 802 (c) are not prohibited by the Act. However, such policies and practices should be carefully examined to ascertain that they are in conformity with the Constitution.

For example, in its discretion, a school district might wish to allow meetings initiated by a nonstudent, for example, a teacher or a nonschool person. In that case, the school is free to adopt such a provision. It should be aware that a court, under present case law, is likely to interpret the Establishment Clause to prohibit teacher-initiated religious activities on school property.

For another example, a school may in its discretion choose uniformly to allow nonschool persons to participate in student meetings to a greater degree than described in 802 (c) (5). If so, a school administrator should be aware that the Constitution may require that if nonschool persons participate in nonreligious student meetings, then the same level of participation must be allowed in religious student meetings. On the other hand, some would argue that in *McCollum* v. *Board of Education*, nonschool persons were prohibited from coming on campus to engage in student activities with religious content.[11] However, in *Widmar*, the Supreme Court indicated that to deny religious nonschool persons equal access for student extracurricular meetings may violate the Free Speech and Equal Protection provisions of the Constitution.[12]

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[10] The standard comes from the Supreme Court in *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969). It is also discussed in Sections 802 (d) (6) and 802 (f).

[11] *McCollum*, 333 U.S. 203 (1948). This seems to be too narrow a reading of *McCollum*, particularly in light of *Widmar* v. *Vincent*, 454 U.S. 263, 269 n. 10 (1981). It is better to read *McCollum* to prohibit nonschool persons from coming in to conduct *curricular* religious activities; it should not be read to prohibit *extracurricular* activities with religious content and nonschool person participation.

[12] *Widmar*, 454 U.S. at 269 n. 10.

As a final example, a school district might decide to allow teachers to participate in noncurriculum related student groups other than in a custodial capacity. Teacher participation in religious meetings may be barred by a court as an Establishment Clause violation. Less likely, but still possible, allowance of teacher participation in any meeting except a religious one might be subject to a challenge by a teacher, as an Equal Protection and Free Speech Clause violation, for singling out the teacher's religious speech, as opposed to political and philosophical speech, for special prohibitions.

D. SECTION 802(d): WHAT THE ACT DOES NOT DO

"Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof —

(1) to influence the form or content of any prayer or other religious activity;
(2) to require any person to participate in prayer or other religious activity;
(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
(5) to sanction meetings that are otherwise unlawful;
(6) to limit the rights of groups of students which are not of a specified numerical size; or
(7) to abridge the constitutional rights of any person."

The Act does not authorize a school to do several things; neither does it prohibit the following things. A school or school district is not authorized by the Act to:

1. *influence* the form or content of any prayer or any other religious activity.
2. *require any person to participate* in prayer or other religious activity. These first two provisions are included in order to comply with the Supreme Court "school prayer" decisions.[13]
3. *expend public funds* beyond the incidental costs of providing the space for the meeting. For example, school districts should

[13] *Engel* v. *Vitale*, 370 U.S. 421 (1962), and *School District of Abington* v. *Schempp*, 374 U.S. 203 (1963), discussed on page 21 of this analysis.

not buy supplies for the meetings. Incidental costs include heat, lights, custodial services, and employee compensation for supervision.

4. *compel any school employee* to attend a meeting if the speech at that meeting is contrary to the beliefs of the employee. This would protect teachers or other employees from having to supervise a meeting with which they disagree. If a teacher does not wish to serve as a monitor for a particular meeting because of the speech at that meeting, constitutionally the school district probably must allow the teacher to decline to serve.

5. sanction meetings that are otherwise *unlawful*.

6. set *numerical limits* for the size of groups allowed to meet. This provision was included partly to reassure religious minority groups.

7. abridge the *constitutional rights* of any person. The Act does not specifically address the constitutional rights of every person with whom the school district deals. The Act protects students who are seeking to meet with other students. The Act does not and cannot abridge constitutional rights that otherwise may exist for students below the secondary level, or for teachers, outsiders, or other persons.

E. SECTION 802(e): ENFORCEMENT OF THE ACT

> *"Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school."*

The Act does not authorize the denial or withholding of federal financial assistance to any school. The primary enforcement mechanism of this Act is a lawsuit by students who are denied their right to meet by a school.[14] Students may ask for an injunction or monetary damages. Usually, a school will be liable for the students' attorneys' fees if the students win.[15]

F. SECTION 802(f): THE SCHOOL ADMINISTRATOR RETAINS DISCIPLINARY AUTHORITY

> *"Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to*

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[14] For example, students could sue under the First and Fourteenth Amendment or 42 U.S.C. 1983.

[15] 42 U.S.C. 1988.

assure that attendance of students at meetings is voluntary."

The Act in no way diminishes the authority of school administrators to maintain order and to protect students on school property. The school remains free to end any meeting that disrupts the school environment, that threatens the well-being of students or faculty, or that threatens school property. The school may also take measures necessary to ensure that attendance of students at any meeting is completely voluntary.

G. SECTIONS 803, 804 and 805: SELF-EXPLANATORY PROVISIONS

"Section 803. As used in this title —

(1) The term 'secondary school' means a public school which provides secondary education as determined by State law.
(2) The term 'sponsorship' includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.
(3) The term 'meeting' includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.
(4) The term 'noninstructional time' means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."

"Section 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby."

"Section 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title."

Section 803 contains definitions of the terms "secondary school," "sponsorship," "meeting," and "noninstructional time," all of which were discussed earlier at the appropriate parts of Section 802.

Section 804 is a severability clause. It simply states that if a court determines any specific part of the Act to be invalid, the remainder of the Act is still law.

Section 805 says that the requirements of this Act supersede all other federal law inconsistent with the Act.

III. LEGISLATIVE HISTORY AND CONSTITUTIONAL CONTEXT

A. The Legislative History of the Equal Access Act

The Equal Access Act is formally known as Title VIII of the 1984 Math-Science Bill, Public Law 98-377. The Act was passed, by a vote of 88-11, on June 27, 1984, by the United States Senate. On July 25, 1984, the House of Representatives passed the Act by a vote of 337-77. On August 11, 1984, President Reagan signed the Act into law.

Congress had been considering equal access legislation since September, 1982. The legislation was proposed to address an increasingly widespread perception by public school administrators that they must prohibit any religious activity by students at any time on school premises in order to comply with the Establishment Clause of the First Amendment. Many legislators were concerned that school administrators, in so doing, were infringing upon the free speech, free association, and free exercise rights of public school students in their schools. Furthermore, some courts had required school districts to deny equal access to students wishing to meet for religious purposes.[16]

Many Congressmen believed that lower courts had failed to protect the important right of students to engage in extracurricular religious speech. They believed this was true especially in light of the Supreme Court decisions in *Widmar* v. *Vincent*[17] and *Tinker* v. *Des Moines Independent School District*.[18]

In *Tinker* v. *Des Moines Independent School District*, the Supreme Court held that a school district could not prohibit students from wearing armbands to protest the Vietnam War,

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[16] *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F. 2d 1038 (5th Cir.), *reh. denied*, 680 F. 2d 424 (July 16, 1982), *cert. denied*, 103 S. Ct. 800 (1983); *Brandon* v. *Board of Education of Guilderland Central Schools*, 635 F. 2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981); *Johnson* v. *Huntington Beach Union High School District*, 137 Cal. Rptr. 43, 63 Cal. 3d 1, *cert. denied*, 437 U.S. 887 (1977).

[17] 454 U.S. 263 (1981).

[18] 393 U.S. 503 (1969).

unless the school could show that such expression by the students created a substantial and material interference with the educational process. In landmark language, the Supreme Court held that students do not shed their First Amendment rights at the schoolhouse gate.[19] The *Tinker* case involved students at both the junior and senior high school levels.

In *Widmar* v. *Vincent*, a state university believed that, in order to comply with the Establishment Clause, it must prohibit student religious groups from meeting on campus. It prohibited students from meeting for religious speech even though it allowed students to meet for other types of speech. The Supreme Court held that once the state university allowed students to meet for expression of their views on campus, it could not discriminate against students wishing to meet for religious speech. To do so was not required by the Establishment Clause and indeed, the Court held, violated the free speech and free association rights of the students. The Court held further that worship was a protected form of speech.

With these two Supreme Court decisions in mind, Congress became increasingly convinced that the free speech rights of secondary students included the right to meet for religious speech. Congressional committees held numerous hearings on the issue of whether students were being denied this right.

The Senate Judiciary Committee held two hearings, chaired by Senator Jeremiah Denton (R-Ala.), at which students testified that they were being denied the right to meet for religious speech, wear religious buttons, distribute religious literature, hold benefit dances, and write essays on religious themes, because of school administrators' fears of violating the Establishment Clause. One school district had gone so far as to prohibit a student from saying the rosary to herself on a school bus.[20]

Hearings were held by the House Education and Labor Committee, chaired by Representative Carl Perkins (D-Ky.), and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, chaired by Representative Don Edwards (D-Calif.). Not only did students testify about the infringement of their free speech rights, but also school administrators testified that there was indeed confusion as to what was permissible on school property.[21]

The Congress recognized the need for guidance on this nationwide problem. The Equal Access Act passed the Senate (88-11) on June 27, 1984, with broad bipartisan support by conservatives and liberals.

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[19] *Id.* at 506.

[20] S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984).

[21] H.R. Rep. No. 710, 98th Cong. 2d Sess. 3 (1984).

On July 25, 1984 the House of Representatives adopted the Equal Access Act by a vote of 337-77. As in the Senate, the bill enjoyed broad bipartisan support, demonstrating the Congressional conviction that equal access for religious, political and philosophical speech is a constitutional and desirable school policy.[22]

B. The Equal Access Act Protects the Constitutional Rights of Public Secondary Students

In its consideration of the legislation, the Congress found that denial of equal access to students who wish to engage in religious, political or philosophical speech violates their freedom of speech, freedom of association, and, in the case of religious speech, also freedom of religion. These rights are the most basic rights that American citizens, including public secondary students, enjoy.

The Congress recognized that the public schools must teach students, by word and *deed*, the proper exercise of these First Amendment rights. By denying students these rights, a school would teach students that freedom of speech is relatively unimportant to the school. Furthermore, in denying students equal access for religious speech, the school would demonstrate a hostility to religious speech that is prohibited not only by the Free Speech Clause of the First Amendment but also by the Establishment Clause itself.

Although Congress realized that students' free speech rights should not disrupt the school environment, it believed that secondary students are mature enough to engage in religious, political and philosophical speech.[23] They are also mature enough to recognize that the mere allowance of equal access does not mean that the state approves the content of all student speech. The Congress found that secondary students can appreciate state neutrality toward religion under which the state allows students equal access for their religious speech, as well as other types of speech.[24]

The Congress also was sensitive about any Establishment Clause concerns. The Act is drafted to avoid violation of the Establishment Clause. The Congress recognized that the state

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[22] Primary proponents of the Senate equal access legislation were Senator Jeremiah Denton (R-Ala.), Senator Mark Hatfield (R-Ore.), and Senator Patrick Leahy (D-Vt.). On the House side, Congressmen Carl Perkins (D-Ky.), Don Bonker (D-Wash.), William Goodling (R-Pa.), Rod Chandler (R-Wash.), and Trent Lott (R-Miss.) were the key co-sponsors of the Act.

[23] S. Rep. 10, 357, 98th Cong., 2d Sess. 35 (1984).

[24] *Id.* at 21, 36.

must not promote religious activity. However, a policy of equal access does not promote religious activity but merely gives it neutral treatment.

C. The Equal Access Act Is Consistent with Supreme Court Precedents

The Establishment Clause is a restriction on *state promotion or suppression* of religious activity. It is not a prohibition of religious activity by *private* individuals, including students who are on school premises. School administrators must recognize this distinction between *state*-initiated religious activity and *student*-initiated religious activity. This distinction is critical in determining whether an activity that takes place on state property violates the Establishment Clause.

The Supreme Court has considered various cases in which religious activity by the state or by individuals has been involved. The Supreme Court has prohibited *state*-initiated, *school*-sponsored or *teacher*-led religious activity in the public schools. However, it has not prohibited *student*-initiated and *student*-led religious activity in the public schools, especially under a policy of equal access.

Confusion exists with respect to what religious activities in public schools are constitutionally permissible. Painting with a broad brush, the significant decisions interpreting the U.S. Constitution on this issue provide as follows:

1. FIRST AMENDMENT: A CHECK ON THE FEDERAL GOVERNMENT. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ." (First Amendment, (1791)).

2. FOURTEENTH AMENDMENT: A CHECK ON STATE AND LOCAL GOVERNMENTS. "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Fourteenth Amendment, (1868)).

3. THE FREE EXERCISE OF RELIGION CANNOT VARY FROM STATE TO STATE. The Free Execise Clause of the Bill of Rights applies equally against state and local governmental entities and not just the federal government. (*Cantwell* v. *Connecticut*, 310 U.S. 296 (1940)).

4. SCHOOLS CANNOT FORCE STUDENTS TO VIOLATE RELIGIOUS CONVICTIONS. Public school students cannot be forced to participate in any activity that violates their religious convictions. (*West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943)).

5. THE ESTABLISHMENT CLAUSE CANNOT VARY FROM

STATE TO STATE. The Establishment Clause of the First Amendment applies equally against state and local governmental entities and not just the federal government. (*Everson* v. *Board of Education*, 330 U.S. 1 (1947)).

6. PUBLIC SCHOOLS CANNOT TEACH "THE FAITH." The public school machinery cannot be used to teach "the faith," whether it be Catholicism, Protestantism, Mormonism, Judaism, or any other "ism." (*McCollum* v. *Board of Education*, 333 U.S. 203 (1948)).

7. PUBLIC SCHOOLS MAY ACCOMMODATE STUDENTS' SPIRITUAL NEEDS. Americans are a religious people. The public schools may accommodate its program to meet the spiritual needs of school children by working with churches, synagogues, and families in released time programs where children can be taught "the faith" during the school day by instructors of the parents' own choosing but free from direct school input or influence. (*Zorach* v. *Clauson*, 343 U.S. 306 (1952)).

8. OFFICIAL STATE-COMPOSED PRAYERS FOR STUDENTS ARE OUT. The state cannot write official school prayers to be recited by children in the public schools. (*Engel* v. *Vitale*, 370 U.S. 421 (1962)).

9. STATE-INITIATED, SCHOOL-SPONSORED AND TEACHER-LED DEVOTIONAL EXERCISES ARE OUT. OBJECTIVE TEACHING OF THE BIBLE AND RELIGION ARE DESIRABLE. State-initiated, school-sponsored and teacher-led devotional exercises for public school children in the public school classroom as part of the curricular program are barred by the Establishment Clause. The objective teaching of the Bible as literature and history, religious music and art, as well as comparative religion, are both permissible and desirable for a complete education. (*School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963)).

10. EVOLUTION CANNOT BE EXCLUDED ON RELIGIOUS GROUNDS. The state cannot exclude the teachings of evolution in the public schools on religious grounds. (*Epperson* v. *Arkansas*, 393 U.S. 97 (1968)).

11. STUDENTS DO NOT LEAVE THEIR CONSTITUTIONAL RIGHTS AT SCHOOLHOUSE GATE. Public school students and teachers do not leave their First Amendment rights at the schoolhouse gate. Students may discuss controversial subjects in and out of the classroom during the school day as long as school discipline is not disrupted nor the rights of others invaded. (*Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969)).

12. STUDENT GROUPS MAY ENGAGE IN CONTROVERSIAL SPEECH. Banning by university officials of a student group engaged in controversial speech violates the First Amendment. (*Healy* v. *James*, 408 U.S. 196 (1972)).

13. PARENTS DIRECT THEIR CHILDREN'S EDUCATION. Parents have the primary responsibility for directing the education

of their children consistent with their religious convictions. (*Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)).

14. A PUBLIC UNIVERSITY CANNOT DENY EQUAL ACCESS. A public university may not deny voluntary student groups equal access to the use of university facilities based upon the religious content of their speech. Worship is a form of protected speech. (*Widmar* v. *Vincent*, 454 U.S. 263 (1981)).

15. STATE-INITIATED, STUDENT-LED DEVOTIONS ARE OUT. State-initiated programs allowing students to lead in classroom devotional exercises as part of the school daily curricular activities violates the Establishment Clause. (*Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), aff'd, 455 U.S. 913 (1982)).

IV. QUESTIONS AND ANSWERS ABOUT THE EQUAL ACCESS ACT

A. Who and What Is Covered by the Act?

Q 1: Does the Act apply to every public school? (Section 802(a)).

A: No. It applies only to a school that 1) is a secondary school, as defined by state law, 2) receives federal financial assistance, and 3) has a limited open forum.[25]

Q 2: Who are the "students" referred to in the Act? (Section 802(a)).

A: The students are those who attend the particular school involved. The Act does not create a right for students from outside a school to come into that school.

Q 3: What does it mean to "conduct a meeting"? (Section 802(a)).

A: The Act itself defines the term "meeting" in Section 803(3). The term "meeting" is broad and includes any activity of a student group which the school permits under its limited open forum.

For example, if any noncurriculum related student group is allowed to use the school diamond for a baseball game, the school cannot discriminate against religious, political, or philosophical student groups that also want to use the diamond for a baseball game.

Q 4: What does the term "religious content of speech" include? (Section 802(a)).

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[25] The meaning of the term "limited open forum" is discussed on pages 9-10 of this analysis.

A: One of the benefits of the Act is to relieve school administrators of the burden of deciding whether a group is religious or not. Before the Act, some administrators believed that the Constitution required them to prohibit any religious activity on school premises. Therefore, an administrator had to decide whether a particular activity of a student group was religious or not, an extremely difficult task. (For example, to some, a Marxist club would be religious whereas, to others, it would be purely political or philosophical.)[26]

Under this Act, administrators need not concern themselves with categorizing the type of speech that occurs at student meetings. The school administrators need only concern themselves with whether the speech, regardless of its category, causes a material and substantial interference with the orderly conduct of educational activities within the school,[27] is unlawful,[28] is threatening the well-being of students and faculty,[29] or occurs at a meeting at which attendance is not voluntary.[30] If a student meeting does any of these things, the school may disallow it on school property regardless of whether the content of the speech is religious, political, or philosophical.

Q5: May student meetings include prayer? (Section 802(a)).
A: Yes. Indeed, many of the situations that the legislation was drafted specifically to address were situations in which students were denied the right to meet for voluntary prayer.

The United States Supreme Court has ruled that *state*-initiated, *state*-composed, *state*-run prayer is unlawful in the public schools. The Supreme Court has never held that *student*-initiated and *student*-run religious activities, including prayer, are unlawful. The Equal Access Act follows this distinction.

In applying the Free Speech Clause, the Supreme Court has held that prayer is a form of speech that is completely protected by the First Amendment.[31] The Court has said that any attempt to distinguish prayer from religious discussions is untenable.

Q6: Are "religious services" permitted during student-initiated meetings? (Section 802 (a)).

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[26] *Malnak* v. *Yogi*, 592 F. 2d 197, 212 (3rd Cir. 1979).

[27] Section 802 (c) (4).

[28] Section 802 (d) (5).

[29] Section 802 (f).

[30] *Id.*

[31] *Widmar* v. *Vincent*, 454 U.S. at 269.

A: A school administrator should not attempt to determine whether students' religious speech is a religious discussion or a religious service. Such a distinction would be extremely difficult to administer and probably would be unconstitutional.

The situations that triggered the need for this legislation involved prayer and Bible study, which some people would consider a religious service. However, none of the situations involved formal religious ceremonies such as a baptism, communion service, or seder. Most of these type of activities could not be carried out under the tenets of many religions without the presence of clergy, and schools are not required to allow outsiders at student meetings. It is doubtful that this type of situation will arise.[32]

A school administrator need be concerned only with maintaining school order and discipline, avoiding any material and substantial interference with the educational process of the school, protecting the well-being of the students or faculty, and ensuring that attendance at any meeting is voluntary. Therefore, an administrator would be wise not to attempt to enforce a distinction between religious services and religious discussion, but instead to concentrate on maintaining the proper discipline.

Q 7: What if groups like the Nazis or the Ku Klux Klan want to meet? (Section 802 (a)).

A: A school administrator should consider several factors. First, the school may require that all student groups must be initiated by students at the school.

Second, even if this criterion is met, the school may require, as part of its limited open forum policy, that all student groups be open to all students in the school. Thus, groups that exclude persons on the basis of race, religion, or national origin, probably could be prohibited from meeting.

Third, a school might conclude that meetings by so-called "hate" groups would materially and substantially interfere with the orderly conduct of educational activities within the school or disrupt the school order and discipline.[33] If the school is prepared to demonstrate that this would be the case, the school could probably prohibit such a group from meeting.

Q 8: Must the meetings be open to all students? (Section 802 (a)).

A: A school may choose to require that all meetings be open to all students. This does not mean that all students must agree with what is said at the meetings. It only means that the students

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[32] Section 802 (c) (5).

[33] Sections 802 (c) (4) and 802 (f).

should be free to go to any meeting, even if the rest of the students at the meeting disagree with their views.

Q 9: What if some students object to other students' meetings? (Section 802 (a)).
A: The students still have a right to meet if they do so in a lawful and orderly manner. The First Amendment does not allow a "heckler's veto" of another person's right to speak. The school has the responsibility to maintain discipline in order that all student groups are able to meet peacefully without harassment.

B. When Is the Act Triggered?

Q 10: What triggers the Equal Access Act? (Section 802 (b)).
A: The Act is triggered if a secondary school receiving federal financial assistance has a limited open forum.

Q 11: What is a "limited open forum"? (Section 802 (b)).
A: A "limited open forum" is a legal term that describes a situation in which an agency of the state, in this case a school, allows persons to meet at a particular time and place to express themselves. Some places are *completely open* forums, such as parks and streets; that is, they are open to *all* persons to express themselves.

The Act applies to a *limited* open forum. "Limited" means that the state has created an open forum but only for a particular class of persons. In other words, the state agency can keep persons outside of the particular class from expressing themselves in a limited open forum.

In this case, this limited open forum is open to students. The school retains the right to deny access to outsiders or other nonschool persons. However, as to students, the school must allow their speech regardless of its content.

Q 12: Does every public secondary school have a limited open forum? (Section 802 (b)).
A: No, although most schools probably do if they allow extracurricular student activities. Some schools may choose not to create a limited open forum. For example, a school may choose not to permit students to meet for extracurricular activities. Then the school does not have a limited open forum.

Q 13: When has the school created a limited open forum? (Section 802 (b)).
A: For purposes of this Act, a school has created a limited open forum whenever it has made available its facilities for use by one or more noncurriculum related student groups to meet during noninstructional time.

Q 14: What is a "noncurriculum related" student group? (Section 802 (b)).

A: A noncurriculum related student group is a group whose activities are not directly related to the curriculum.[34] The emphasis is on the word "directly."

To determine whether any activity permitted by the school is noncurriculum related and therefore triggers the Act, a school administrator should ask two questions:[35]

1) Does a public school usually sponsor an activity with this subject matter?
2) Does the school require or directly encourage student participation in such a group in connection with curriculum course work?

To *avoid* triggering the Act, the answer for *all* student activities allowed by a school must be yes to both questions.

Public schools normally sponsor academic, athletic, or musical activities. However, public schools do not sponsor political or activist organizations, religious groups or private social or vocational organizations, such as Key Club, 4-H clubs, and Future Teachers of America. Therefore, if a school has a political group, a private social organization, or a religious group meeting, it definitely has a noncurriculum related activity and, therefore, a limited public forum.

Even where the only extracurricular activities are academic, athletic, or musical, the activities may still be noncurriculum related if the school or teacher does not require or directly encourage student participation in such a group in connection with curriculum course work. For example, some music teachers require that a person attend an early morning choral group in order to receive credit for their music curricular class. In that case, the choral group is directly related to the curriculum and an open forum policy would not be triggered by that group. However, a music teacher might offer a choral group in which participation is not required or directly encouraged in connection with a music curricular course. In that case, the choral group would be noncurriculum related and would create a limited open forum at that school.

The purpose of the "noncurriculum related" requirement is to protect a school from being required to establish a limited open forum and yet still allow the school to have some student activities that are immediately tied to the school curriculum. However, this language is not meant to be a loophole for school districts to avoid triggering the Act. A school district, for example, cannot by

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[34] Section 803 (3).

[35] 130 *Cong. Rec.* H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

definition decide that all of its groups are curriculum related and, thereby, avoid application of the equal access legislation.

The Act is triggered, *not by the school's definition* of its student activities, but by looking *objectively* at whether the activities are actually directly tied to the curriculum by asking the two questions given above. In other words, the Act is *not* triggered if: 1) the *only* activities allowed are those that are normally sponsored by a school (that is, academic, musical, or athletic); *and* 2) the school actually does actively sponsor those activities by requiring or directly encouraging participation in connection with curriculum course work.

Q 15: What is "noninstructional time"? (Section 802 (b)).
A: The term "noninstructional time" is defined in Section 803 (4) as time set aside by the school before *actual* classroom instruction begins or after *actual* classroom instruction ends. In short, it is the time when the school allows students to meet for extracurricular activities.

Q 16: Does noninstructional time include lunch periods, activity periods during the school day, or other times when students can meet? (Section 802 (b)).
A: The Act indicates that such times would be covered if they are set aside by the school as noninstructional time. It includes time before an individual student's school day begins or after it ends, even though other students may be receiving classroom instruction at the time because of split sessions or staggered school schedules.[36] (Some do not agree with this reading of the Act and would define noninstructional time in terms of the school's instructional day, not the individual's schedule.)

School administrators should remember that Congress believes that equal access is a constitutional requirement that was not created by this Act. To deny students equal access during such times, if other student groups are allowed to meet at those times, is to risk a lawsuit by those students for discriminatory treatment under the First Amendment.

Q 17: May a school place any restrictions on student meetings in a limited open forum? (Section 802 (b)).
A: Yes. A school may place "time, place, or manner" restrictions on student meetings in a limited open forum, as long as those restrictions are *reasonably* and *neutrally* applied to *all* groups.

Examples of neutral time restrictions would be a requirement that all student meetings must take place on Monday,

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[36] 130 *Cong. Rec.* S8355-56 (daily ed. June 27, 1984) (statement of Sen. Denton).

or must occur before 8:30 AM, or must last less than 30 minutes. Neutral restrictions may be placed on where the students meet and how they meet, for example, whether an adult must supervise them.

The school also retains disciplinary authority and the ability to protect the well-being of students and faculty.

C. How May a School Implement the Act?

Q 18: When has a school fulfilled its requirements under the Equal Access Act? (Section 802 (c)).

A: Section 802 (c) describes one set of circumstances, a "safe harbor," when a school has fulfilled the requirement to offer equal access to a student group. It has done so when it uniformly allows equal access for a student activity that 1) is voluntary and student-initiated; 2) is not sponsored by the school or its employees; 3) has employees present at religious meetings only in a nonparticipatory capacity; 4) does not materially and substantially interfere with the orderly conduct of educational activities within the school; and 5) is not directed, conducted, controlled, or regularly attended by nonschool persons.

Q 19: What does it mean to say that Section 802 (c) is a "safe harbor" provision?

A: If a school conforms with Section 802 (c), it will be deemed to have met the fair opportunity section of the Act. In Section 802 (c), Congress describes a "safe harbor" for school administrators. If a school district chooses to follow these provisions and is challenged for allegedly violating the Act, generally it will be presumed that there has been no violation.

However, policies and practices differing from those described in Section 802 (c) are not prohibited by the Act. Such policies and practices should be carefully examined to ascertain that they are in conformity with the Constitution. The *only* requirement of the Act is that the school must grant equal access if it has a limited open forum.[37]

Q 20: What does "student-initiated" mean? (Section 802 (c) (1)).

A: It means the students themselves are seeking permission to meet and take responsibility for leading the meeting. It means that a nonschool person on campus is not initiating the meeting. It means that a teacher, any employee of the school, or the school itself is not initiating the meeting.

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[37] See discussion in Part II. C., page 11 of this analysis.

Q 21: Why is "student-initiated" a safe harbor provision? (Section 802 (c) (1)).

A: This provision is used to define a safe harbor because it recognizes the critical distinction between state-initiated and student-initiated activity. For religious meetings, this distinction is particularly relevant because the Establishment Clause may prohibit state-initiated religious activities but does not prohibit student-initiated religious activities. This provision also would ensure that student meetings originate only out of student interests and not from the interest of outside religious, political, philosophical, or other groups. Under this provision, the request to meet must come from a student or students rather than from a teacher, a parent, or a nonschool person.

Q 22: What is "sponsorship of the meeting"? (Section 802 (c) (2)).

A: Section 803 (2) defines "sponsorship" for purposes of the Act to include the act of promoting, leading, or participating in a meeting by the school or an employee of the school.

Q 23: Why is "nonsponsorship of the meeting" a safe harbor provision? (Section 802 (c) (2)).

A: This provision is used to define a safe harbor because the school district may for either policy or constitutional reasons wish not to sponsor various extracurricular student meetings. For example, sponsorship of a religious student meeting, either by special encouragement or particular financial assistance, may create problems under the Establishment Clause. Also, a school for policy reasons may not wish to sponsor some political and philosophical groups granted access under the Act.

If a school wishes to move outside of the safe harbor, it may decide, for example, to allow teachers to participate in non-curriculum related student groups other than in a custodial capacity. If it allows teachers to participate in religious meetings, it may be subject to a challenge under the Establishment Clause. However, if it allows teacher participation in any meeting except a religious one, a teacher may challenge the school under the Free Speech Clause for singling out the teacher's religious speech, as opposed to political and philosophical speech, for special prohibitions. The safe harbor provision avoids this dilemma, but a school has the discretion to move outside of the safe harbor.

Q 24: If a school adopts Section 802 (c) (2) and (3), does the assignment of a teacher for custodial purposes constitute sponsorship of the meeting? (Sections 802 (c) (2) and 803 (2)).

A: No. As Section 803 (2) makes clear, the assignment of a teacher or other school employees for custodial purposes does not constitute sponsorship of the meeting. The teacher is there

merely to ensure the protection of the school's property and the students' well-being. The payment of a school-required monitor for any club is almost definitely an "incidental cost" of providing space for student-initiated meetings.[38]

Q 25: If a school adopts Section 802 (c) (2), is it "sponsorship" for a school to allow students to announce meetings through the school media? (Section 802 (c) (2)).
A: Probably not. The Act does not directly address this issue. If all student meetings uniformly may be announced through school media, then it should be permissible to announce student meetings granted access under this Act. However, schools may not promote such meetings and, therefore, may not give special attention to such meetings.

Q 26: What may a school do to communicate to students that it does not promote, endorse, or otherwise sponsor noncurriculum related student groups? (Section 802 (c) (2)).
A: A school may post and announce a disclaimer that states that it does not promote, endorse, or otherwise sponsor any noncurriculum related student group.

Q 27: What does "materially and substantially interfere with the orderly conduct of educational activities within the school" mean? (Section 802 (c) (4)).
A: This language is taken from the Supreme Court decision in *Tinker v. Des Moines Independent School District*. The Supreme Court required the school to allow students to wear armbands protesting the Vietnam War, unless school administrators could show that their activity would materially and substantially interfere with the orderly conduct of the educational activities of the school.

However, a mere fear of disruption is not enough. The school must be able to show a basis for its fear that legitimizes its refusal to allow the students to engage in expressive conduct.

The school has every right to ensure that its first priority, the education of its students, is not hindered. It must exercise this goal consistently with the Constitution.

Q 28: Who are "nonschool persons"? (Section 802 (c) (5)).
A: A nonschool person includes anyone who is not a student, a teacher, an administrator, or an employee of the school district. It would also include students from other schools.

Q 29: Does the Act give nonschool persons a right to attend student meetings? (Section 802 (c) (5)).

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[38] Section 802 (d) (3)

A: The Act does not create any new rights for nonschool persons. It leaves the question of whether to allow nonschool persons to attend student meetings entirely within the discretion of the school district acting in accordance with the Constitution.

The question of whether nonschool persons have a *constitutional* right of access to school premises has not been completely answered by the courts. The safest assumption is that a school does not have to allow nonschool persons on school premises. However, once a school allows some nonschool persons to come on campus, it probably cannot discriminate among nonschool persons.

Q 30: May a school allow nonschool persons to "direct, conduct, control, or regularly attend" student meetings? (Section 802 (c) (5)).

A: If the school intends to stay within the safe harbor of 802 (c) (5), it may not allow nonschool persons to direct, conduct, control, or regularly attend student meetings. However, in its discretion the school may decide to allow nonschool persons to participate in student meetings, including allowing them to direct, conduct, control, or regularly attend the meetings. Furthermore, the Constitution arguably requires that, if nonschool persons participate in nonreligious meetings, then the same level of participation must be allowed to nonschool persons in religious meetings.

Q 31: If a school adopts Section 802 (c) (5), what does "direct, conduct, control, or regularly attend" mean? (Section 802 (c) (5)).

A: If a school allows nonschool persons to attend activities of student groups that are noncurriculum related, a nonschool person may be allowed to participate in the meetings. However, that person must not be allowed to control the meeting.

The principle of the Act is that the meetings be student-initiated and student-run. If a nonschool person merely asks questions and carries on a conversation with the students while the students are running the meeting, that would not be conducting or controlling the meeting.

The school administrator should be concerned with the activities of nonschool persons only when they are on school property. A student is free to talk with whomever he or she wants off school property outside of school hours. The school is not to be concerned with whether a student involved in a meeting chooses to consult with a nonschool person outside of school hours.

Q 32: If a school adopts Section 802 (c) (5), what does "regularly attend" mean? (Section 802 (c) (5)).

A: "Regularly attend" is a concept that the school board in its reasonable discretion can best define. Attendance at every meeting would violate this section of the Act. The school board's

definition of "regularly attend" must apply to all student meetings granted access under the Act.

D. What Is a School Not Authorized to Do?

Q 33: Does the Act authorize the school district to suggest to students a particular focus for their religious activity? (Section 802 (d) (1)).
A: No. In Section 802 (d) (1), the Act says it does not authorize the school district to influence the form or content of any religious activity taking place on school property. The Act thus recognizes the Supreme Court decisions in *Abingtcn* v. *Schempp* and *Engel* v. *Vitale*.

Q 34: Does the Act authorize the school to require a student or a teacher to participate in prayer or any religious student activity? (Section 802 (d) (2)).
A: No. Section 802 (d) (2) affirms that the Act does not authorize the school to require any student or teacher to participate in any religious activity.

Q 35: Does the Act authorize the school to give student groups money to buy religious, political or philosophical material to use in their meetings? (Section 802 (d) (3)).
A: No. The Act neither authorizes nor prohibits such expenditures. The expenditure of funds for some of these meetings might create constitutional problems.

Q 36: May the school provide heat, light, and janitorial services for the meetings? (Section 802 (d) (3)).
A: Yes. The Supreme Court has held that such a provision is only an incidental cost and is not constitutionally significant.

Q 37: Does the Act authorize a school to require a teacher to supervise a meeting with which he or she disagrees? (Section 802 (d) (4)).
A: No. Constitutionally, a teacher probably may not be required to attend any meeting, if the content of the speech at the meeting is contrary to his or her beliefs. This includes religious, political, philosophical or other meetings. Teachers have a First Amendment right to be free from compulsion to attend an activity, even in a nonparticipatory capacity, to which they might object.

Q 38: What if a school cannot find a teacher to supervise a group because every teacher disagrees with the beliefs of that group? (Section 802 (d) (4)).
A: If no teacher will supervise a meeting because the speech at the meeting is contrary to the beliefs of every teacher, a school

possibly could refuse to allow the student group to meet, since under state law the school may have a responsibility to supervise such meetings. However, the school should consider the alternative of allowing the students to have a nonschool employee as a monitor, perhaps a parent of one of the students. If no monitor is required by state law, at its discretion, the school may allow the meeting to take place without a monitor.

This requirement should not be used as a loophole to prohibit unpopular or minority groups from meeting. The school should make a good faith effort to find an appropriate person to supervise a student meeting.

Q 39: What meetings would be "otherwise unlawful"? (Section 802 (d) (5)).

A: Section 802 (d) (5) is a catch-all. Therefore, one cannot attempt to delineate every meeting that would be "otherwise unlawful." This is a matter for school district attorneys to determine using federal and state law. Examples of probably unlawful meetings would be ones at which obscene material, violence, illegal sexual activity, or use or exchange of drugs is involved.

Q 40: Do school districts retain the right to specify a numerical size that a student group must attain before it is allowed to meet under this Act? (Section 802 (d) (6)).

A: Yes. However, this discretion should be exercised *only* in rare circumstances. This provision was put in the Act specifically to meet the fears of some religious minorities that a school district might place a size limitation on groups being allowed to meet and, thereby, exclude meetings of students from these minority groups. In passing this legislation, Congress was strong in its conviction that such limitations should not be used to prevent minority religious groups from meeting. Such a course would be vulnerable to constitutional attack.

A school district should place a size limitation on student groups *only* if there is an emergency situation in which a shortage of facilities for student meetings exists. Even in a shortage, the school should consider rotating student groups by allowing student groups to meet less often and, thereby, opening up facilities for more groups to meet.

Q 41: What does the term "to abridge the constitutional rights of any person" mean? (Section 802 (d) (7)).

A: The language of Section 802 (d) (7) simply reaffirms that the Act does not authorize school districts to engage in unconstitutional behavior. Nor is the Act to be seen as the final interpretation of the full extent of students' rights at school.

In Sections 802 (a) and (b), the Act sets forth a specific set of circumstances under which equal access must be granted. It

does not indicate that there are no other circumstances under which equal access might also be constitutionally required or allowed. For example, some persons believe that teachers or elementary students have greater free speech rights to be involved in religious, political and philosophical meetings than the Act itself specifically provides.

E. How is the Act Enforced?

Q42: May federal funds be cut off to a school district that violates this Act? (Section 802 (e)).
A: Probably not. Congress was concerned that a school district might unknowingly violate the Act in good faith and did not want to jeopardize such a school district's federal funding.

Q43: If there is no funds cut-off, what is the remedy under the Act? (Section 802 (e)).
A: Persons who are aggrieved under this Act may sue in federal district court for the proper judicial remedy. Students may seek an injunction to prohibit the school from denying them the right to meet under this Act, or they may seek monetary damages for violation of their statutory rights under this Act. Students' attorneys' fees may also be awarded against a school district found in violation of the Act.

F. What Authority Does the School Retain?

Q44: What authority does the school retain over the student meetings allowed under the Act? (Section 802 (f)).
A: The Act does not restrict a school district's discretion except to require equal access. The school retains complete authority over these meetings to maintain order and discipline on the school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary. Furthermore, the school has authority to ensure that the orderly conduct of educational activities within the school is not materially and substantially interfered with by any meeting under this Act. Furthermore, the school is not required to sanction meetings that are otherwise unlawful.

Schools retain all disciplinary authority which they previously held. The purpose of the Act is merely to require that the schools comply with the First Amendment requirement of equal access. This Act in no way gives students a right to engage in conduct that disrupts the educational process.

Q45: If students engage in activity that substantially or materially disrupts the orderly conduct of educational activities

claiming it is religious, political, or philosophical, can the school prohibit the activity? (Sections 802 (f) and 802 (c) (4)).

A: Yes. The school can prohibit such an activity. The school should be ready to show that such an activity does materially and substantially interfere with the orderly conduct of the educational activities within the school. The fact that a disruptive activity is religious, political, or philosophical, does not give it special protection. The Act merely gives such groups equal access to school facilities. Those groups still have to abide by the same disciplinary rules that are applied to any other activity within the school.

Q 46: How may a school administrator determine whether the well-being of students and faculty needs to be protected? (Section 802 (f)).

A: This is an issue that must be left up to the reasonable discretion and judgment of school administrators. The purpose of this provision is to reaffirm existing authority for the protection of students and faculty from any physical, mental, or emotional harm. It is not a license for school administrators to ban meetings with which they do not agree. It is, however, a provision that recognizes that school administrators may protect the physical, emotional, and mental well-being of students while those students are on school premises.

Q 47: How may a school administrator assure that attendance of students at a meeting is voluntary? (Section 802 (f)).

A: Although it is unlikely to be needed, this provision allows schools to protect students from any form of alleged coercion or undue influence, which some opponents of the legislation feared. If there are indications that students are not attending a meeting out of their own volition, the school may take measures to ensure that their attendance is voluntary, by asking the students whether their attendance is voluntary or by notifying the students' parents of the school's concern.

Q 48: May a school require parental consent for attendance at meetings? (Section 802 (b) and (4)).

A: Yes, if the school wants to require parental consent, nothing in the Act prohibits it from doing so. A consent requirement may be an additional means of protecting students.

G. Additional Questions

Q 49: What policy should a school district adopt to implement this Act?

A: If the school district wants to have a policy, it can simply state that it is the policy of the school district to comply with the Equal Access Act, Title VIII of Public Law 98-377. The school dis-

trict or individual school might want to formalize its policy as to whether it will have a limited open forum, although the practice rather than the policy on paper determines the existence of a limited public forum.

Q50: If a court covering the area in which a school is located has ruled in a case involving the equal access concept, is a school, nevertheless, bound to comply with the Equal Access Act?
A: Yes. Unless a court covering your area rules that the Act is unconstitutional, a school must comply with the provisions of the Act.

In past years, a few courts have ruled in certain cases involving equal access. None, however, has ruled specifically on the constitutionality of the Equal Access Act or its interpretation.

Q51: What records should a school administrator keep in administering the Act?
A: The maintaining of records is within the discretion of the administrator. In order to show non-discriminatory practices, however, when a student request to meet is received, a school administrator might want to record the name of the student requesting the meeting, when the request was made, and the response of the administrator.

Q52: Where may further information be obtained regarding the Act, its legislative history and school policies under the Act?
A: Further information may be obtained by contacting the Christian Legal Society, Washington, D.C. office at:

Christian Legal Society
P.O. Box 1492
Springfield, Virginia 22151
(703) 941-3192

APPENDIX 1

Statement Concerning Equal Access Guidelines By The Honorable Don Bonker (D-Wash.)*

Mr. Speaker, as the House sponsor of the recently enacted Equal Access Act, I would like to join my colleague and coauthor, the gentleman from Pennsylvania (Mr. Goodling), in presenting the Equal Access Guidelines to Congress. These guidelines should prove to be of great value to school administrators, teachers, and students in interpreting and implementing the Equal Access Act. In essence, the Act establishes a policy of nondiscrimination with respect to the treatment of student groups, including student religious groups, which wish to meet during noninstructional time at public secondary schools.

Although the Equal Access Act generated much controversy, groups which participated on both sides of the debate worked together to hammer out these guidelines. Like the Equal Access Act itself, the guidelines are the product of compromise and I would like to commend these groups for putting aside their differences to develop this much needed document.

The guidelines are especially important because there is no congressional report for the final version of the legislation, which was added as an amendment to the Emergency Math/Science Education Act. Already, my office has been contacted by numerous school officials and other interested parties concerning specific features of the Act. These guidelines provide practical answers to the questions raised by the new law.

I would be remiss if I did not acknowledge the work of the Education and Labor Committee under the leadership of the late Carl Perkins from Kentucky. Without Chairman Perkins' parliamentary skill and determination, this legislation would not have been enacted. I would also like to commend the gentleman from Pennsylvania (Mr. Goodling) for his leadership on the other side of the aisle. As a former schoolteacher, principal, school board president, and school superintendent, he brought special knowledge and experience to the equal access debate and I concur with his remarks, which follow, concerning the Equal Access Act.

* In Congressional Record (10/11/84)

Statement Concerning Equal Access Guidelines By The Honorable William F. Goodling (R-Pa.)*

As a coauthor of the Equal Access Act, I am pleased to place in the Record, with the gentleman from Washington (Mr. Bonker) guidelines for implementing the Equal Access Act that were drafted jointly by leading outside proponents and opponents of the law. These groups should be commended for putting their differences behind them once the law passed and working together to provide an agreed upon explanation of the Act for school administrators. The text of these guidelines is entirely the product of these outside groups--not the congressional drafters of this Act. We did, however, take the liberty of deleting a few misplaced statutory citations.

As these guidelines suggest, the Equal Access Act imposes only one basic requirement on school administrators. Student-initiated religious groups must receive the same treatment as other student-initiated groups. Beyond this, subsection c of the Act suggests ways to comply with this basic requirement and subsection d of the Act identifies certain potentially troublesome actions that are not authorized — or prohibited — by the Act, but nothing in subsections c and d of the Act are stated as requirements. School administrators are left free to determine how the equal access requirement can best be fulfilled in their school. As a former school administrator, I have great faith in the ability of school administrators to fairly implement the equal access requirement within the spirit of religious accommodation underlying the Act.

We would like to reiterate that these guidelines are intended as an explanation and do not reflect the official position of the Congress or the U.S. Government.

* In Congressional Record (10/11/84)

APPENDIX 2

The Equal Access Act Guidelines

The organizations listed below were all involved with The Equal Access Act in the 98th Congress. Some actively supported the bill. All are deeply interested in seeing the equal access concept implemented in the secondary schools of America in accordance with law.

After consideration over a 2-year period, The Equal Access Act became law on August 11, 1984, passing the Senate 88-11 and the House 337-77. The final version reflects the usual give and take of the legislative process. This brief explanation of the Act is designed to help school administrators, teachers and student groups who must live under the Act in real school situations to understand what this new legislation means.

The congressional intent in passing The Equal Access Act was to develop legislation that respects both the Establishment Clause and the Free Exercise and Free Speech Clauses of the First Amendment, so that secondary school students may organize meetings. While Congress recognized the constitutional prohibition against state-sponsored religious activities in public schools, it also believed that student-initiated speech, including religious speech, should not be excised from the school environment. At the same time, Congress affirmed that it is local school boards and administrators who have the right and responsibility to implement equal access in conformity with the Act and the Constitution. Moreover, in passing the Equal Access Act, Congress did not intend to prohibit any activity that is otherwise constitutional.

The title -- The Equal Access Act -- explains the essential thrust of the Act. There are three basic precepts.

The first basic precept is equal treatment. If a public secondary school permits student groups to meet for student-initiated activity not directly related to the school curriculum, it is required to treat all such student groups equally. This means the school cannot discriminate against any students conducting such meetings "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." Sec. 802 (a). This language was used to make it clear that religious speech was to receive equal treatment, not preferred treatment.

The second basic precept is protection of student-initiated and student-led meetings. With respect to religious activities in

the public schools, the Supreme Court has held unconstitutional state-initiated and state-sponsored religious activities. (This Act leaves the "school prayer" decisions undisturbed.) The Court has not ruled on student-initiated and student-led religious activities that are not state-sponsored but merely given equal access with other noncurriculum related student activities.

The third basic precept is preservation of local control. The Act does not limit the authority of the school to maintain order and discipline or to protect the well-being of students and faculty. It only marginally limits other authority to make policy about student meetings.

While the Act does not specifically cover every situation, an understanding of the three basic precepts of the Act should be a sufficient guide in addressing most situations.

Here are some questions and answers which indicate how the Act is intended to work:

Q 1: What is meant by "limited open forum"? Sec. 802 (a) and (b).
A: A limited open forum is created when a secondary school provides an opportunity during "noninstructional time" for students to organize meetings to discuss subject matter not directly related to the school curriculum and permits those meetings on school premises. The forum created is said to be "limited" because it is only the school's own students who can take advantage of the open forum. Outsiders are not granted any independent right of access by The Equal Access Act.

Q 2: Does a school have to provide a limited open forum for students?
A: No. The school or local policy-making body has the exclusive authority to determine whether it will create or maintain a limited open forum. If a school has a limited open forum, it may not discriminate against a student group because of the content of its speech. If a school does not have a limited open forum, the request of a single student group to organize a meeting or a club which is not directly related to the school curriculum requires the school to determine whether it wants to create such a forum.

Q 3: What are "secondary schools"?
A: The Act explicitly states that this question is to be answered with reference to state law. Sec. 803 (1).

Q 4: Do meetings of curriculum related student groups trigger implementation of The Equal Access Act?
A: No. Only allowing meetings of noncurriculum related student groups triggers implementation of the Act.

Q5: What is meant by "noncurriculum related student groups"? Sec. 802 (b).

A: A noncurriculum related student group is a group or club which is interested in a subject matter not directly related to the school curriculum. The math club, the Spanish club, the drama club, and athletic teams would normally be curriculum related. A religious club, political club or service club would be considered noncurriculum related.

Q6: Who determines which student groups are curriculum related?

A: Local school authorities. However, a school cannot defeat the intent of The Equal Access Act by some all-encompassing definition that arbitrarily results in all but one or a few student clubs being defined as curriculum related.

Q 7: When can noncurriculum related student groups meet?

A: A limited open forum requiring equal access may be established during "noninstructional time." Sec. 802(b). The Act defines "noninstructional time" as time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. Sec. 803 (4). It includes time before an individual student's school day begins or after it ends, even though other students may be receiving classroom instruction at the time because of split, staggered or flexible school schedules. Thus students whose school day has not begun or has already ended may meet together, although other students' school day has already begun or has not yet ended.

Q8: Can noncurriculum related student groups meet during the school day?

A: The Act neither requires nor forbids a limited open forum for noncurriculum related student clubs during the instructional day. The constitutionality of equal access for religious clubs during the school day is currently being litigated in the Federal courts.

Q9: May a school establish regulations for meetings which take place in its limited open forum?

A: Yes. The Act does not take away a school's authority to establish time, place and manner regulations for its limited open forum. For example, it may establish a reasonable time period on any one school day, a combination of days, or all school days. It may assign the rooms in which student groups can meet. It can enforce order and discipline in the meetings. The key is that regulations must be uniform and nondiscriminatory.

Q 10: Can a school require a minimum number of students to form a noncurriculum related club?
A: Not if it "limit[s] the rights of groups of students." Sec. 802 (d) (6). Care must be exercised that the school not discriminate against numerically small student groups which wish to establish a club by setting a requirement of a minimum number of students to form a club. The key is to be flexible in dealing with small student groups and to accommodate student groups that want to meet. For example, one teacher could monitor several small student groups meeting in a large room.

Q 11: Should a school formulate a written policy for the operation of a limited open forum?
A: If a school decides to create a limited open forum or if such a forum already exists, it is strongly recommended that a uniform set of regulations be drawn up as soon as possible and be made available to administrators, teachers, students and parents. The importance of having such a document will become clearly evident if the school either denies a student group the opportunity to meet or is forced to withdraw that opportunity. When the rules are known in advance, general acceptance is easier to obtain.

Q 12: What does "student-initiated" mean? Sec. 802 (c) (1).
A: "Student-initiated" is one of the key precepts of the Act. It means the students themselves are seeking permission to meet and will direct and control the meeting. It means that neither a teacher or other employee of the school nor the school itself is initiating the meeting. Further, nonschool persons may not direct, conduct or control student meetings. School authorities may take reasonable steps to assure compliance with these provisions. These provisions do not mean that students are forbidden to seek advice from nonschool persons.

Q 13: May teachers be present during student meetings?
A: Yes, but there are limitations. For insurance purposes or by local policy or state law, teachers are commonly required to be present during student meetings. In order to avoid any taint of state sponsorship of religion, teachers or employees are to be present at student religious meetings only in a "nonparticipatory capacity." Sec. 802 (c) (3). The Act also prohibits teachers or other school officials from influencing the form or content of any prayer or other religious activity. Although the Act could literally be read as prohibiting teacher participation in all clubs, it is doubtful that Congress intended that result. Congress did not intend to prohibit teacher participation in nonreligious student meetings. Thus, for example, a teacher could participate in the chess club or the Future Teachers of America. A school, under the Act, could pro-

hibit teacher participation in political clubs because of the possibility of undue influence.

Q 14: May outsiders attend a student meeting?
A: Yes, if invited by the students, unless the school adopts a policy barring all "nonschool persons." However, the nonschool persons cannot, in fact, be running the student group. Nonschool persons may not direct, conduct, control, or regularly attend activities of student groups. A school may decide not to permit any outside resource people to attend any club meetings, or it may determine how many times during a school year an outside resource person may attend any club meetings, or it may limit the number of outside resource people who may attend a single meeting.

Q 15: Can a teacher or other school employee be required to be present at a student meeting if that person does not share the beliefs of the students?
A: No school employee can be required to attend a meeting "if the content of the speech at the meeting is contrary to the beliefs" of that employee. However, if a school establishes a limited open forum, it is responsible for supplying a monitor for every student group meeting if a monitor is required.

Q 16: Does the assignment of a teacher to a meeting for custodial purposes constitute "sponsorship of the meeting"?
A: No. Sec. 803 (2).

Q 17: Does the expenditure of public funds for the incidental cost of providing the space (including heat and light) for student-initiated meetings constitute sponsorship?
A: No. Sec. 802 (d) (3).

Q 18: If a school pays a teacher for monitoring a student religious club, does that constitute "sponsorship"?
A: Congressional debate apparently took for granted that payment of a school-required monitor for any club was an "incidental cost of providing the space for student-initiated meetings." Sec. 803 (d) (3). However, there are some who maintain that schools may not expend money to monitor religious clubs in view of the Establishment Clause.

Q 19: Does the use of school media to announce meetings of noncurriculum related student groups constitute "sponsorship" of those meetings?
A: The Act does not directly address this issue. If only information about all meetings is given, the use of school media --

the public address system, the school paper, the official bulletin board -- may not constitute sponsorship of meetings. However, schools should be cautioned that the Act forbids their promotion of these meetings, and the singling out of one or a few of them for special attention would be promoting them. Because a basic precept of the Act is student- initiation, each noncurriculum related student group is responsible for its own promotion.

Q 20: Do school authorities retain disciplinary control?
A: Yes. The Act emphasizes the "authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." Sec. 802 (f). Furthermore, the school must provide that "the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school." Sec. 802 (c) (4). These two provisions do not authorize a school to prohibit certain student groups from meeting because of administrative inconvenience or speculative harm. For example, a group cannot be barred at a particular school because a similar student group at a different school has generated difficulties.

Q 21: What about groups which wish to advocate or discuss changes in existing law?
A: Students who wish to discuss controversial social and legal issues such as the rights of the unborn, drinking age, the draft and alternative lifestyles may not be barred on the basis of the content of their speech. However, the school must not sanction meetings in which unlawful conduct occurs. Sec. 802 (d) (5).

Q 22: What if some students object to other students meeting?
A: The rights of a lawful, orderly student group to meet are not dependent upon the fact that other students may object to the ideas expressed. All students enjoy free speech constitutional guarantees. It is the school's responsibility to maintain discipline in order that all student groups be afforded an equal opportunity to meet peacefully without harassment. The school must not allow a "hecklers' veto."

Q 23: What about so-called "hate" groups?
A: Student groups which are unlawful, Sec. 802 (d) (5), or which materially and substantially interfere with the orderly conduct of educational activities, Sec. 802 (c) (4), can be excluded. However, a student group cannot be denied equal access because its ideas are unpopular. Freedom of speech includes ideas the majority may find repugnant.

Q 24: Must noncurriculum related student groups have an open admissions policy?
A: The Act does not address this issue. It is an open constitutional question whether a requirement that all group meetings during the limited open forum be open to all students without regard to race, gender, religion or national origin could be enforced against a group with restrictive policies. The answer to this question may in part turn on whether a State's civil rights laws require an open attendance policy.

Q 25: What may a school do to make it clear that it is not promoting, endorsing or otherwise sponsoring noncurriculum related student groups?
A: A school may distribute a disclaimer which plainly states that in affording such student groups an opportunity to meet it is merely making its physical facilities available.

Q 26: What happens if a school violates The Equal Access Act?
A: The law contemplates a judicial remedy. An aggrieved person could bring suit in a U.S. district court to compel the school to observe the law. No cutoff of federal funds is involved.
Sec. 802 (e).

Q 27: Does the Act have any impact on the after-hours rental of school facilities to nonstudent groups?
A: No. Such rentals would continue to be governed by local regulations and general constitutional principles.

Q 28: What about situations not addressed in this explanation?
A: At the present time, indications are that the Department of Education will not issue regulations with respect to this Act. Questions about its implementation may arise. The groups below are available for advice:

American Association of School Administrators
1801 N. Moore
Arlington, VA 22209
703-528-0700
Bruce Hunter

American Civil Liberties Union
600 Pennsylvania Ave., S.E.
Washington, D.C. 20003
202-544-1681
Barry W. Lynn

American Jewish Congress
Commission on Law and Social Action
15 E. 84th St.
New York, NY 10028
212-879-4500
Marc Stern/Lois Waldman

Christian Legal Society
P.O. Box 1492
Springfield, VA 22151
703-941-3192
Sam Ericsson/Kim Colby

National Association of Evangelicals
1430 K St., N.W.
Washington, D.C. 20005
202-628-7911
Forest Montgomery

In addition to the above groups, the following also participated in the formulation of these guidelines:

Americans for Democratic Action
Mitch Edelstein

Baptist Joint Committee on Public Affairs
John Baker

General Conference of Seventh-day Adventists
Gary M. Ross

National Education Association
Joel Packer

The following groups are in general agreement with the guidelines:

American Federation of Teachers
Catholic League for Religious and Civil Rights
Christian Educators Association
Freedom Council
National Association of Christian Educators
National Council of Churches of Christ in the U.S.A.
People for the American Way

BIBLIOGRAPHY

Congressional Debates:

130 *Cong. Rec.* H3855-79 (daily ed. May 15, 1984).
130 *Cong. Rec.* S8331-70 (daily ed. June 27, 1984).
130 *Cong. Rec.* H7666-69, 7691-7718 (daily ed. July 24, 1984).
130 *Cong. Rec.* H7723-56, 7834-37, 7843-48 (daily ed. July 25, 1984).
130 *Cong. Rec.* H12270-73 (daily ed. October 11, 1984).

Congressional Reports:

H.R. Rep. No. 710, 98th Cong., 2d Sess. (1984).
S. Rep. No. 357, 98th Cong., 2d Sess. (1984).

Congressional Hearings:

Equal Access: A First Amendment Question:: Hearing Before the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1983).

Equal Access Act: Hearing on S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1983).

Hearings on the Equal Access Act: Hearings on H.R.2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor, House of Representatives, 98th Cong., 1st Sess. (1983).

Religious Speech Protection Act: Hearing on H.R.4996 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor, House of Representatives, 98th Cong., 2d Sess. (1984).

Secondary School Equality of Access Act of 1984: Hearing on H.R.5439 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, House of Representatives, 98th Cong., 2d Sess. (1984).

Law Review Articles:

Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don't Need A Constitutional Amendment*, 61 N.C.L. Rev. 141 (1982).

Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983).

Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983).